SIM KOOI SOON

v.

MALAYSIA AIRLINE SYSTEM

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[APPLICATION NO: R1-25-87-2001]
4 MAY 2005

LABOUR LAW: *Employment - Constructive dismissal - Demotion - Applicant downgraded from rank of captain to first officer - Whether applicant guilty of gross misconduct and insubordination - Whether respondent entitled to demote applicant - Whether there was acquiescence on applicant's part - Whether there was merit in claim for constructive dismissal*

ADMINISTRATIVE LAW: *Judicial review - High Court - Certiorari - Findings of Industrial Court - Whether erroneous - Whether there was valid reason to interfere with decision of award*

This was an application by the applicant for an order of *certiorari* to quash the award of the Industrial Court rejecting his claim for constructive dismissal. The issues that arose were (1) whether chairman had acted irrationally by concluding that applicant's claim was in contravention of s. 20(1A) of the Industrial Relations Act 1967; (2) whether chairman was correct in deciding there was no merit in applicant's claim for constructive dismissal and (3) whether this court had reason to interfere with the award by judicial review.

Held (dismissing the application):

[1] The chairman had made a finding that the trigger date for the purposes of s. 20(1A) of the Industrial Relations Act 1967 was 5 April 1997 (the date the applicant had walked out of his job). Claim for reinstatement was filed on 16 June 1997, which was clearly out of time. The chairman was correct in his finding that the applicant did not present his claim within 60 days of the dismissal. (p 806 e-f)

[2] The applicant had been found guilty of operating a flight without the mandatory load sheet, as a result of which he was downgraded from rank of captain to first officer. Further, despite being warned by the respondent that he would have to show a positive improvement in his general attitude and performance towards flying, the applicant was continuously defying instructions from his superior. The applicant had committed a gross

misconduct which was compounded by his insubordinate behavior. The respondent was entitled to demote him. The question of constructive dismissal did not arise. Hence, the chairman was correct in deciding that there was no merit in the applicant's claim for constructive dismissal. (p 808 c)

[3] It was only after a review board meeting on 4 April 1997 that the applicant considered himself constructively dismissed. Before that, the applicant had not protested against the demotion or the reduced basic. The Industrial Court had correctly concluded that acquiescence on the part of the applicant had vitiated his claim for constructive dismissal. The Industrial Court's award did not suffer from any infirmities 'illegally', 'irrationally or procedural impropriety'. The award was neither perverse nor unreasonable and the finding of facts by the chairman was supported by evidence. This court had no reason to interfere with the award by judicial review. (p 808 g-h)

Case(s) referred to:

America International Assurance Co Ltd v. Dato' Lam Peng Chong [1999] 2 CLJ 771 CA ***(refd)***

Fung Keong Rubber Manufacturing Sdn Bhd v. Lee Eng Kiat [1981] 1 MLJ 238 ***(refd)***

Goh Kean Hock v. Mahkamah Perusahaan Malaysia [2002] 5 MLJ 37 ***(refd)***

Kejuruteraan Samudera Timur Sdn Bhd v. Seli Mandoh & Anor [2004] 1 CLJ 393 HC ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd [1997] 2 CLJ 11 FC ***(refd)***

MBf Unif Trust Management Bhd v. Mahkamah Perusahaan Malaysia & Anor [2004] 5 CLJ 391 HC ***(refd)***

Palmolive (M) Sdn Bhd v. Yap Koh Foong & Anor [2001] 2 MLJ 600 ***(refd)***

Pelangi Enterprise Sdn Bhd v. Oh Sue Choo & Anor [2004] 3 AMR 17 ***(refd)***

Syarikat Kenderaan Melayu Kelantan v. Transport Workers' Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(1)

For the applicant - Teh Hong Jet; M/s Tan Kim Siong & Teh Hong Jet
For the respondent - Steven Thiru; M/s Shook Lin & Bok

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif J:

Application

This is an application by the applicant for an order of *certiorari* to quash the Industrial Court Award No 530 of 2001 handed down on 14 July 2001. In this case the applicant's claim for constructive dismissal was rejected by the Industrial Court.

Facts

The relevant facts leading to this application are these. The applicant joined the services of the respondent as a cadet pilot on 1 March 1982. In 1995, he was promoted with the rank of captain for Boeing B 737 - 300 / 400 1500 aircraft.

On 9 November 1995, the applicant operated a flight MH 1436 from Kuala Lumpur to Langkawi without a load sheet. A load sheet is a flight document which contains flight data or information. It is a mandatory requirement under international and domestic law, that every flight must have a load sheet on board while in flight.

Resulting from the incident, the respondent by a letter dated 16 November 1995, suspended the applicant from his flying duties and was asked to attend a non-technical inquiry on 20 November 1995. In response to the notice, the applicant on 19 November 1995 wrote to the Chairman of the Board of Inquiry stating as follows:

> **Re: MH 436 KUL/LGK dated 9.11.1995 Departure without Load sheet**
>
> With reference to the above, which I fully accept that I am totally in the wrong. I have been fully counseled by Captain Yusof Nasir and I promise never to repeat the same big mistake. I repent of my big mistake and will ensure that legal aspects of flight operation and management will not be overlooked.

At the non-technical inquiry held on 20 November 1995, the applicant again admitted that he operated the MH 1436 on 9 November 1995 without a load sheet. The matter was then reported by the respondent to the Department of Civil Aviation (DCA).

The DCA by a letter dated 13 December 1995, requested the applicant to give a written explanation. The applicant gave his explanation *vide* his letter dated 15 December 1995, once again admitting to flying without a load sheet and apologizing for the mistake.

The DCA by a letter dated 22 December 1995, which was copied to the Director of Flight Operation of the respondent, suspended the applicant's air transport pilot license for a period of 30 days with immediate effect. Following his suspension the respondent decided to reduce the applicant's salary for one month and downgraded him to the rank of First Officer.

On 8 February 1996, the respondent wrote to the applicant stating that as the applicant had not met the required standards and requirements to be reinstated as Captain following the suspension of his license, his reassignment as First Officer would be extended for an indefinite duration. The applicant was also informed that his reinstatement to the position as Captain would be kept in abeyance until he showed a positive improvement in his general attitude and performance towards flying.

On 15 February 1996 the respondent through its Human Resources Manager wrote to the applicant informing him that he was to continue to receive the reduced basic salary and aircraft type allowance as stated in its letter dated 8 February 1996. In the meantime, the applicant despite being downgraded to First Officer, continued to wear the four (4) bar epaulettes depicting him as Captain. The respondent on 19 March 1996, wrote to the appellant directing the appellant to use three (3) bar epaulettes denoting the rank of First Officer but the applicant refused to do so.

Subsequently, the respondent by a letter dated 3 April 1997 directed the applicant to attend a Review Board Meeting on 4 April 1997. During the meeting, the board, after perusing witnesses report and hearing the applicant, concluded that the recent events and the applicant's statement and outburst coupled with his indifferent attitude shown, were unanimous that the applicant was not yet ready to regain his command status and the applicant was so informed. The applicant told the board that he was not accepting the decision of the board and that he would not operate under any circumstances as a co-pilot anymore. The board however decided to give the applicant one week to think over carefully of the statement he made to the board. On 11 April 1997, when the board reconvened and asked for the applicant's decision, the applicant informed the Board that he maintained his stand. The Board then reaffirmed its earlier decision and concluded that the applicant should not be reinstated as captain and recommended that he should be suspended and charged for insubordination.

On 19 April 1997 the applicant wrote to the respondent recording his protest in respect of the respondent decision in demoting him and requested that he be installed back to his former position as captain. The applicant wrote two more letters dated 9 May 1997 and 11 May 1997 to the respondent stating and requesting the same.

On 19 May 1997 the applicant through his solicitors gave notice to the respondent requesting the respondent to rectify its breaches and to reinstate him to his former position as captain by 3 June 1997. As there was no response from the respondent, the applicant through his solicitor's letter to the respondent dated 6 June 1997 considered himself constructively dismissed.

The respondent in its letter dated 18 June 1997, denied the allegation of constructive dismissal.

On 16 June 1997, the applicant made his representation to the Director General of Industrial Relation under s. 20(1) Industrial Relation Act 1967 (the Act). As the matter could not be resolved, the Honourable Minister of Human Resources referred the applicant's representation to the Industrial Court under s. 20(3) of the Act. The Industrial Court found in favour of the respondent. Hence, this application for judicial review by the applicant.

Scope Of Judicial Review

It is trite law that in judicial review proceedings of an award of the Industrial Court, the High Court does not exercise appellate powers (*America International Assurance Co. Ltd. v. Dato' Lam Peng Chong* [1999] 2 CLJ 771). The jurisdiction of the High Court is purely supervisory in nature. I have said this before in *Kejuruteraan Samudera Timur Sdn. Bhd. v. Seli Mandoh & Anor.* [2004] 1 CLJ 393, where I stated:

> In the realm of industrial disputes, the jurisdiction of the High Court to issue orders of *certiorari* is neither an appellate nor a revisional jurisdiction. It is an 'extraordinary original jurisdiction' of a supervisory character, with the object of enabling the superior courts to keep the inferior tribunals within the bounds of their authority. The High Court has no jurisdiction under s. 25 of the Courts of Judicature Act 1964 to interfere with the findings of the fact reached by the Industrial Court on the ground that the decision is erroneous, except where there is a clear error of law on the face of the record. It cannot arrogate the powers of the court of appeal by substituting its own judgment for that of the Industrial Court on question of fact, and it cannot review the evidence. (*Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn Bhd* [1976] 1 LNS 85 FC). The High Court may not utilise *certiorari* proceedings as a cloak to entertain what, in truth is an appeal against findings of fact. (*William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235 CA).

It is also settled law that the High Court will not interfere with a decision of Industrial Court unless it can be conclusively established that the decision is infected with errors of law (*Syarikat Kenderaan Melayu Kelantan v. Transport Workers' Union* [1995] 2 CLJ 748). The errors of law that merit curial intervention by High Court are broadly housed under four heads; procedural impropriety, irrationality, illegality and proportionality (*Kumpulan Perangsang Selangor Bhd. v. Zaid bin Haji Mohd* [1997] 2 CLJ 11; *Pelangi Enterprise Sdn. Bhd. v. Oh Sue Choo & Anor.* [2004] 3 AMR 17). Even if there was a mistake, the court will not interfere, if, based on the totality of the evidence, the ultimate decision reached was proper and right (*Goh Kean Hock v. Mahkamah Perusahaan Malaysia* [2002] 5 MLJ 37).

Again it is a cardinal principal in judicial review proceedings that the High Court would not interfere with findings of fact, particularly in relation to the credibility of witnesses, found by the Industrial Court (*Palmolive (M) Sdn. Bhd. v. Yap Koh Foong & Anor.* [2001] 2 MLJ 600 and *MBF Unit Trust Management Berhad v. Mahkamah Perusahaan Malaysia & Anor.* [2004] 5 CLJ 391).

With the above principles of law in mind, I shall now proceed to consider the grounds advanced by the applicant.

Findings

The Industrial Court found that the applicant's representation to the Director General of Industrial Relation Department on 16 June 1997 was not made within the mandatory sixty days limit as imposed by s. 20(1A) of the Act and accordingly declined jurisdiction. The learned Chairman stated as follows:

> As he had walked out of his job on 5th April 1997 in protest against an alleged breach of contract, this court holds that the claimant terminated his contract by reason of the employer's conduct on 5th April 1997. That being the case he claimed that the constructive dismissal was on 1st June 1997 or 3rd June 1997 is incorrect and the claim for reinstatement filed on 16th June 1997 is clearly out of time being outside the 60 days limit in s. 20(1A) of the Act. The claimant obviously selected the date 1st June 1997 or 3rd June 1997 as the date he was constructively dismissed to overcome the limitation imposed in s. 20(1A) of the Act.
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> As the claimant has failed to show that he was constructively dismissed on 1st June 1997 or 3rd June 1997 and he himself has admitted as dismissed after the review board meeting on 4th April 1997, it is the finding of this court that the claimant's claim for reinstatement is out of time and declined jurisdiction to proceed any further.

It is the contention of the applicant that from the above passage the learned Chairman had acted irrationally by concluding that the applicant's claim was in contravention of s. 20(1A) of the Act. With respect, I am unable to agree. I am of the view that the learned Chairman was correct to hold that the applicant was obliged to strictly comply with the time period stipulated in s. 20(1A). The learned Chairman rightly relied on the principles established by the Federal Court in *Fung Keong Rubber Manufacturing Sdn Bhd v. Lee Eng Kiat* [1981] 1 MLJ 238 where the Federal Court stated:

> ... It is so strict it goes to the jurisdiction of the Industrial Court to hear the complain. By that we mean that, if the claim is presented just one day late, the court has no jurisdiction to consider it.

It is a common ground in this case that the representation was filed by the applicant on 16 June 1997. Taking 16 June 1997 as the trigger point from which the sixty days was computed, the learned Chairman considered the following plausible dates:

(i) 8 February 1996 or 15 February 1996, when the respondent decided to reduce his salary for an indefinite period. With regard to these dates the learned Chairman found as follows:

> The Company wrote to the Claimant on 8th February 1996 informing the Claimant that his reassignment as a First Officer B737 would be extended for an indefinite duration (CO17). In the eyes of the Claimant this act (reassignment) was construed as the potential and paramount breach of contract which led him to walk out of his job on 4th April 1997 – some 14 (fourteen) months later. The Claimant did not challenge this alleged breach but he continued work as First Officer in compliance with the Company's decision and directive.
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> The Company again wrote to the Claimant on 15th February 1996 (CL12) allegedly received by the Claimant on 2nd March 1996 that he would be paid the reduced basic and aircraft type salary until further notice. The Claimant should have walked out of his job then as this is another paramount breach of the contract. But he did not. He continued working as First Officer.
>
> The Claimant continued working as First Officer, on the reduced salary from February 1996 to March 1997 ie, for 14 months. This would indicate acquiescence in the breach, if breach of contract is proven.

(ii) 4 April 1997 or 11 April 1997 when the Review Board decided against the reinstatement and when the applicant took the position that he would not serve anymore as First Officer. As to these dates the learned Chairman found as follows:

> The Claimant attended a Review Board meeting on 4th April 1997. As the Board found the Claimant was not ready to be reinstated as Captain, for reasons found in the minutes of the Review Board, the Claimant was informed that he would have continue to be First Officer until he was found ready to regain his command status.
>
> The Claimant refused to accept the decision of the Board and told the Board, in no uncertain terms: "I'll not operate on RHS anymore and I'll not operate to DPS tomorrow" and walked out of the meeting.
>
> At this moment in time he has considered himself as constructively dismissed. Let us look at the evidence of his examination-in-chief:
>
> Q: How did Captain Nawawi respond?
>
> A: As I know he did not say anything and the meeting ended.
>
> I just left the room and considered myself dismissed.
>
> **The above chronology of events is of course the clearest evidence, that the Claimant considered himself as dismissed on 4.4.1997.** The next day he did not report for work although there was a scheduled flight to Bali, nor did he on 6.4.1997 onwards or on any other date. This date is compounded by the following facts happening after this as follows:
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> a) The Claimant walked out of his job as First Officer on 5.4.1997 and never returned to work thereafter.
>
> b) Although the Company/Review Board gave him another week to reconsider his decision he took no steps to apply for leave or to be excused from flying.
>
> c) On completion of the one week for consideration and when asked by the Review Board of his decision he was not only adamant but arrogantly reiterated his decision of the 4.4.1997 that "I will not retract my decision of not flying in the Right Hand Seat."

(iii) 3 June 1997, which was the date the applicant stated as the date on which he was constructively dismissed. This date was considered by the Industrial Court as follows:

If 5th April 1997 or 11th April 1997 is not the date why then did he consider himself dismissed on 1st June 1997 or 3rd June 1997 which was two months later? Can this be the date as alleged by the Claimant?

An examination of the Claimant's answers to questions in cross-examination would reveal the answer.

Q: Would you confirm from the end of one month suspension until you walked out, you worked as co-pilot?

A: Yes.

Q: Refer to pp. 11 and 12 of "CL". Would you consider this to be a breach of contract by your employer when your rank, salary and allowance were reduced?

A: Yes.

Q: When did this breach first take place?

A: First took place on 26th December 1995.

Q: Based on your contention that breach was on 26th December 1995, did you protest against this breach in writing to the company any time after the alleged breach?

A: No.

Q: Would you confirm that company had categorically told you on 4th April 1997 that you will not be flying as a pilot anymore?

A: The chairman stated this.

Q: You acted on that statement and decided not to work as co-pilot on 4th April 1997. Is that correct?

A: Yes.

Q: Can it then be said that the company committed breach on 4th April 1997 when chairman told you that you will never be pilot again.

A: Breach was on 26th December 1995.

Q: Would you confirm that company did not dismiss you on 4th April 1997?

A: Yes.

Q: Would you confirm company did not dismiss you on any date before or after 4th April 1997?

A: Yes.

Q: Would you agree that you refused to work from 4th April 1997 because you felt your company breached its contract of employment by not putting you back in the position of Captain?

A: This was the final straw and decided cannot work anymore as co-pilot.

Q: You had stopped working on 4th April 1997. You told company you will not fly as co-pilot anymore unless breach rectified. When you made this decision on 4th April 1997, why are you claiming you were constructively dismissed on 3rd June 1997?

A: Gave company chance to rectify the breach.

Q: You did not have evidence to show that you were dismissed by company on 3rd June 1997?

A: Yes.

Q: Do you confirm you were not working as co-pilot from 4th April 1997 because of the alleged breach?

A: Yes.

The learned Chairman considered all the above dates and made a finding that the trigger date for the purposes of s. 20(1A) was 5 April 1997. Quite clearly the conclusion of the learned Chairman was based on the evaluation of evidence before him. Basically the finding of the learned Chairman that the trigger date was 5 April 1997 was a finding of facts. As stated earlier the court in a judicial review proceeding would not interfere with such findings unless it can be shown that such finding is totally irrational and unsupported by evidence. From the record, I am of the view that the learned Chairman was correct in his finding that the applicant had not present his claim within 60 days of the dismissal. Accordingly, the learned Chairman was right to decline jurisdiction to hear the applicant's case.

In this case, the learned Chairman despite declining jurisdiction nevertheless considered whether the demotion of the applicant amounted to the constructive dismissal. From the facts, there were two aspects to the demotion of the applicant. First, it was the misconduct of the applicant in operating the flight without a loadsheet. In this connection, the learned Chairman made the following observation:

In this respect Captain Mohd Nawawi (COW2), another senior pilot and the chairman of the review board went so far as to say that this statutory requirement of load sheet is so serious that the department of civil aviation can even close this airline if it had preferred. This was unchallenged.

Captain Mohd Yusof Nasir also informed that court that having observed the Claimant flying as co-pilot, having consulted the fleet manager and review board and authorized examiners, he found that the Claimant was unsuitable to operate as a captain as it involves the lives of the passengers and the crew.

The learned Chairman further stated:

The Claimant was not repentant about the load sheet incident. To him the safety of the passengers, crew and the aircraft was less important than leaving off schedule. He was more concerned about discomfort to passengers. He was even arrogant when admitted that on that day, he flew on schedule.

This was the attitude the company was so concerned about. The plane was full that day and the damage if happened would be disastrous.

The various incidents, while flying as co-pilot, as set out in the minutes of the review board, at CO pp. 21 to 30 clearly show that the claimant had an attitude problem.

The second aspect to the demotion was the insubordinate behavior of the applicant ie, his insistence on wearing four bar epaulettes. This was also considered by the Industrial Court. The learned Chairman made the following observations:

Despite being warned by the Company, *vide* its letter of 8th February 1996 that he would have to show a positive improvement in his general attitude and performance towards flying, the claimant was continuously defying instructions from his superior of wearing 4 bars epaulettes. The claimant's explanation is that he was showing his protest to the Company. The fact remains that the claimant was committing an act of insubordination or even an act of defiance of authority. Would it be reasonable or would it be safe for the management of the company to entrust on the claimant the responsibility of piloting a place with lives of passengers and crew and the image of the national air carrier with it. The company witnesses explained to the Court other incidents involving pilots in other airlines where lives were lost because of pilots with attitude or unsound mind problems. The Company could not afford a national disaster before taking action. It is therefore, the submission of the Company that in taking the decision to reassign the claimant to the position of Co-Pilot until he showed a positive improvement, the Company had acted justly and reasonably in all the circumstances. This Court agrees. Hence the action by the Company cannot be construed as breach of contract entitling the claimant to claim constructive dismissal but on the contrary the Company had acted justly and reasonably throughout his time.

Based on the above observations, the Industrial Court concluded by stating:

> It is therefore the submission of the company that in taking the decision to reassign the Claimant to the position of co-pilot until he showed a positive improvement, the company had acted justly and reasonably in all the circumstances. This court agrees. Hence the action by the company cannot be construed as breach of contract entitling the Claimant to claim constructively dismissal but on the contrary the company had acted justly and reasonably throughout this time.

Based on the above, I am of the view that the learned Chairman was correct in deciding that there was no merit in the applicant's claim for constructive dismissal. To me, as found by the learned Chairman, the applicant had committed a gross misconduct which was compounded by his insubordinate behavior. The respondent was therefore, entitled to demote him. Thus, the question of constructive dismissal does not arise.

In addition there is this issue of acquiescence as raised by the respondent before the Industrial Court. The learned Chairman, after analyzing the facts in this case found that there was acquiescence on the part of the applicant. The learned Chairman stated that:

> Did the Claimant leave soon after? The answer is in the negative. He had admitted during the cross examination that the first breach as on 26 December 1996 yet he did not protest but had stayed on despite the reduced basic and aircraft type salary and flew as a co-pilot (as he still did not get back his ATPL Licence). More than one year later in February 1996 when the company's vice president of flight operations wrote him a letter extending his reassignment indefinitely (incidentally affecting his salary also) he did not leave either.
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> Then there was this review board meeting on 4 April 1997 and only after that decision did the Claimant consider himself constructively dismissed and left. All in all the time span has been not less then 14 months! That to my mind is "not soon after: but acquiescence and equity should not come to his aid."

To me, the Industrial Court had correctly concluded that acquiescence on the part of the applicant had vitiated the applicant's claim for constructive dismissal.

In conclusion, I am of the view that the Industrial Court's Award does not suffer from any of the infirmities 'illegally', 'irrationally or procedural impropriety'. The award was neither perverse nor unreasonable and the findings of facts by the learned Chairman were supported by evidence. This court has no reason to interfere with the award by way of judicial review. In the circumstances, the applicant's application is hereby dismissed with costs.